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Nuclear Sovereignty: Reservation Waste Disposal for the Twenty-First Century and Beyond

Mark Poole

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I. Introduction

Despite the longstanding conflicts of law among federal, state, and Native American sovereigns and the complexity of environmental regulation and health and safety issues in the area of nuclear disposal, the Mescalero Apache should be afforded the opportunity through self-determination to pursue the location of a private nuclear waste disposal facility on reservation land.

The Mescalero Apache are poised to begin construction of a commercial nuclear waste repository on their reservation in southeastern New Mexico. They are prepared to invoke their rights of inherent sovereignty to reinforce this business venture into the arena of nuclear waste disposal. An exercise of Indian sovereignty of this magnitude is almost certain to be confronted with a two-pronged attack from federal and state governments. This bifurcated check on Indian power is a result of the existence of a tripartite legal system in the United States consisting of federal, state, and Native American interests. The conflict inherent in this system is evident in the case of the Mescalero.

The solicitation of a nuclear waste repository by the Mescalero has set the doctrine of Indian sovereignty on a collision course with the issues surrounding the nuclear debate. Nuclear waste storage has been one of the hottest and most politically charged issues in environmental law. In the past decade, the debate has amplified. The demand for a storage facility is growing exponentially as nuclear power plants around the nation are running out of on-site storage space. One recent estimate puts the national spent fuel inventory at 23,681 metric tons of uranium, plutonium, and other radioactive byproducts. The crisis is reaching a critical mass in New Mexico with state officials and members of Congress vehemently voicing their opposition to the repository in the face of the Mescalero Tribal Council members' apparent commitment to proceed with the project.

The controversy invites yet another look at tribal sovereignty, this time in the context of one of the most pressing environmental problems facing mankind today. What ultimately happens with this project will help determine the...
state of Native America as the 21st century draws near, with nuclear waste serving as a sort of litmus’ test for Indian sovereignty. This Note begins with a brief overview of the Mescalero Apache focusing on their recent attempts to site a nuclear waste storage facility. Part II examines the origins of federal Indian law with an emphasis on Native American sovereignty and the implications this doctrine may have in the debate over nuclear waste disposal. The interaction among the tribes, the federal government, and the states, specifically in the arena of state and federal environmental regulation, is discussed in Part III. Part IV addresses concerns about environmental racism in siting a nuclear waste storage facility on a reservation. The discussion in Part V endorses the policy of self-determination for the Mescalero Apache. The final section concludes with a discussion of some of the obstacles the Mescalero will face if allowed self-determination in building a Monitored Retrievable Storage (MRS) facility and suggests a number of ways in which these obstacles can be overcome.

II. Mescalero Apache

The Mescalero Apache have a long and storied history. The tribe, which once ranged across Texas, New Mexico, Arizona, and the Mexican states of Sonora and Chihuahua, today consists of 3,400 members confined to a 460,000-acre reservation in south-central New Mexico, a rugged landscape of “pine-forested peaks rushing streams and abundant wildlife,” dominated by all 12,003 feet of Sierra Blanca. Descendants of the legendary Chiefs Geronimo and Cochise, the Mescalero are proud of their historical resistance to outsiders, repeatedly rebuffing invasion by the Spanish, Mexicans, Texans, and the United States Army.

A. Tribal Economic Development

At present, however, the Mescalero people may be facing a new and potentially more deadly foe, nuclear waste. As nuclear power has proliferated nationwide, the demand for a permanent solution to the disposal problems associated with this industry has intensified. This increasing demand has created a situation of potentially great economic benefits for those states or Indian tribes willing to take on the burdens associated with housing the nation’s highly radioactive wastes. Tribes are particularly susceptible to this pressure since economic development is essential to improving the standard of living on reservations and to continuing tribal existence into the future. In the words of Fred Peso, Mescalero Tribal Vice-President, “We’re a tribe, into perpetuity. We have no interest in jumping into the melting pot and the mainstream. We want to keep our young people at home, and this may be an opportunity to help us.” Thus, the tribal leadership believes that creating economic opportunity for young tribal members, and thereby providing incentive to remain on reservations can solidify the future existence of the tribe. The hope is that the tribe’s cultural integrity can be preserved as well.

Under the leadership of Wendell Chino, tribal president for over thirty years, the tribe has made significant economic strides, developing a 400-room luxury resort called the Inn of the Mountain Gods, a ski area, a sawmill, and a cattle ranch. This has earned Mr. Chino and his tribal council a reputation of business savvy for their innovative attempts to secure the tribe’s future. There is some truth in one of Mr. Chino’s favorite sayings that “the Navajos make rugs, the Pueblos make pottery, and the Mescaleros make money.” Despite this development, however, tribal unemployment still hovers at about thirty percent and the median family

5. See id.
6. See id.
7. See supra note 2, at A18.
9. See Tom Meersman, Indians say no to NNSP, others, STAR TRIBUNE, Feb. 2, 1995, at IA (Mescalero Apache Tribal leaders estimate that the benefits of such a project could total $270 million over forty years).
10. Estimates are that perhaps one-third of the Native American population presently lives in poverty. See Dirk Johnson,

Economic Pulse: Indian Country Economies Come to Life on Indian Reservations, N.Y. TIMES July 3, 1994, at A1. In addition, according to economist Terry Anderson of the Political Economy Research Center, fourteen percent of Indian households on reservations have annual incomes of less than $2,500, compared to five percent of the overall United States population. On-reservation unemployment rates are as high as forty percent. See Charles Oliver, Government’s Destructive Benevolence, INVESTOR’S BUS. DAILY, July 11, 1994, at 1. Native Americans also experience significantly higher rates of alcoholism than the general population. See infra note 40.

11. Lippman, supra note 6, at A3.
12. See id.
14. Id.
income on the reservation is $13,900, less than half the average for the state of New Mexico.\textsuperscript{15}

B. Nuclear Waste Policy Act and Monitored Retrievable Storage

On October 17th, 1991, the Mescalero Apache obtained the distinction as the first recipient of a Phase I grant of $100,000 from the Office of the Nuclear Waste Negotiator to initiate independent studies for the feasibility of hosting a MRS facility.\textsuperscript{16} This office and the ensuing grant program were created under the 1987 Amendments to the Nuclear Waste Policy Act of 1982 (NWPA) to solicit a voluntary MRS host through negotiation, concentrating on state and local entities and Native American nations.\textsuperscript{17} The NWPA was passed in response to the growing sense of urgency nationwide for a permanent repository for nuclear wastes generated by 54 nuclear utility companies.\textsuperscript{18} Estimates are that more than two dozen of these nuclear utilities will exceed the waste storage capacity available in underwater storage pools by 1998.\textsuperscript{19} Under NWPA the federal government pledged to assume title for all nuclear waste in the United States by January 31, 1998, storing it in a permanent nuclear waste facility yet to be built.\textsuperscript{20} The MRS would be a temporary storage facility designed to store waste for up to forty years while the permanent facility is under construction.\textsuperscript{21} The 1987 Amendments directed the Department of Energy (DOE) to exclusively study a site at Yucca Mountain in Nevada as the permanent site.\textsuperscript{22}

After receiving a Phase II-A grant of $200,000 and completing initial feasibility studies, the Mescalero applied for the final grant of $2.8 million.

This was the last step in the program before formally volunteering as host and only one other entity, the Fort Mc Dermott Paule-Shoshone of Oregon and Nevada, was willing to proceed as far.\textsuperscript{23} However, just as the Mescalero entered the final phase of technical feasibility, opposition from New Mexico state officials led by (former) Governor Bruce King and the New Mexico congressional delegation, culminated in the 1994 Bingaman Amendments to NWPA, which eliminated the grants for the feasibility study program.\textsuperscript{24} After carefully following the procedures set up by NWPA, Mescalero tribal officials felt betrayed by the government and frustrated that years of planning and study had to be abandoned since the process they had relied upon was gutted.\textsuperscript{25} As a result, tribal officials have decided to use the knowledge gained under the first two phases of the MRS feasibility study and look elsewhere.

C. Negotiations for a Private MRS Facility

The Mescalero Apache turned to the private sector to avoid the governmental gridlock, inviting representatives from nuclear power utilities nationwide to enter into negotiations for a private MRS venture.\textsuperscript{26} To their surprise, officials from thirty-three companies attended a meeting in April 1994, led by Northern States Power Co. of Minnesota, a utility facing a storage crisis.\textsuperscript{27} In December of 1994, a nonbinding agreement between Northern States Power and thirty other utilities and the Mescalero Apache tribe was reached in a detailed letter of intent to store radioactive waste, subject to tribal consent by referendum.\textsuperscript{28}

Several potential legal obstacles are presented in establishing a private MRS facility. First, the

\textsuperscript{15} See id.


\textsuperscript{17} See id.

\textsuperscript{18} See Bryce, supra note 13, at 6.

\textsuperscript{19} See Meersman, supra note 9, at 1A.

\textsuperscript{20} See Luther I. Carter, The Mescalero Option: Storage of Nuclear Waste at Mescalero Apache Reservation in New Mexico, BULLETIN OF THE ATOMIC SCIENTISTS, Sept. 1994, at 5. The Department of Energy's (DOE) obligation to take title to and dispose of all nuclear waste from utilities with which it contracted was affirmed by the D.C. Circuit in Indiana Michigan Power Co. v. Department of Energy, 88 F.3d 1272 (D.C. Cir. 1996). The utilities had paid fees to DOE to be kept in a trust fund to pay for construction of an MRS or comparable facility, and ultimately, to pay for a permanent repository. See Peter E. Peikowski, Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Energy Law, 65 Geo. Wash. L. Rev. 778, 779; 42 U.S.C. 1022(a)(1). The D.C. Circuit held that the DOE's final interpretation, that its obligation was triggered upon actual existence of an operational storage facility, was incorrect and in direct contravention of NWPA's plain statutory language. Indiana Michigan Power, 88 F.3d at 1277. According to NWPA's language, DOE had an obligation to dispose on January 31, 1998, regardless of the construction of a repository. See id. This obligation was only conditional on the payment of fees to the fund, not the existence of a repository. See id.

\textsuperscript{21} See id.

\textsuperscript{22} See Collins, supra note 8, at 282.

\textsuperscript{23} See Erickson, supra note 3, at 76.

\textsuperscript{24} See id. at 80. Notably, all nine of the applicants for the Phase II-A grants were federally recognized Indian tribes, with four receiving the funding. See id.


\textsuperscript{26} See Statement by Fred Peso to the House Oversight and Investigations Subcommittee, March 17, 1994. During his testimony, Mr. Peso called the voluntary siting program a "failure."

\textsuperscript{27} See Rudy Abramson, New Mexico Apaches Have a Hot Idea, L.A. TIMES, May 28, 1994, at 22.

\textsuperscript{28} See Meersman, supra note 9, at 1A.
NWPA contains no provisions regarding a privately run nuclear waste storage program. This is potentially problematic since any facility would need to obtain a license from the Nuclear Regulatory Commission (NRC) before beginning operation. In the absence of federal legislative directives, it remains an open question whether the federal government would have exclusive regulatory authority over a private facility, or whether the tribe and/or the state would also have some regulatory input. This involves very real concerns surrounding transportation of the nuclear waste from utilities around the country to the repository and the power to regulate such transport. Additionally, assuming that the NRC licensing procedure constitutes "major federal action," an environmental impact statement would be necessary under the National Environmental Policy Act (NEPA) for construction to begin on a private repository. Yet another unanswered legal question is the potential effect of New Mexico state environmental regulation on assertions of the Mescalero tribe's sovereignty. These questions will be addressed in Part VI.

D. Results of the Referenda

A referendum was held in late January, 1995, to determine the fate of the private MRS facility. In an electrified atmosphere, characterized by seventy-four percent voter turnout, the plan was rejected by a vote of 362 for the waste site and 490 opposed. The result was surprising given the tribe's long electoral history of "rubber stamping" Wendell Chino's proposals, particularly in light of Mr. Chino's thirty-five year tenure as tribal council president and the immense power he wields under the tribal constitution. In addition to Mr. Chino's formal powers, it is widely recognized that failing to support his position is looked upon with extreme disfavor and rumors abound of threats made to the job security and family safety of those in opposition.

The issue was again placed before the Apache people in a second referendum on March 10, 1995. This time around, tribal members voted 593-372 in favor of finalizing negotiations with Northern States Power and the other utilities. Tribal officials explained the dramatic turnaround as simply a lack of information or abundance of misinformation "spread by antinuclear organizations" in the first referendum. Opponents such as Rufina Marie Laws and Joseph Gerommo claim that the vote was contaminated by false assurances of safety and promises of $2,000 cash awards. In any event, tribal officials got the result they sought and took one significant step closer to finalizing a deal for nuclear waste storage.

However, on April 16, 1996, the eleven nuclear utility members of Mescalero Fuel Storage, L.L.C., a group formed out of the original utilities to pursue a private MRS venture with the Mescalero, voted to "indefinitely suspend further work" on development of the project. The utilities and the Mescalero were unable to iron out a number of areas of disagreement. The Mescalero, however, will continue to pursue a private MRS facility on their own.

Thus, the Mescalero are on the verge of assuming responsibility for the commercial nuclear waste of the United States. However, their courtship of the nuclear power industry is by no means taking place in a vacuum. Intense political pressure and scrutiny accompany the Mescalero's solicitation. As the pressure intensifies, the foundation on which the Mescalero will have to rely is their right to inherent

29. See Bryce, supra note 13, at 6.
31. See Meersman, supra note 9, at 1A.
32. See Revised Constitution of the Apache Tribe of the Mescalero Indian Reservation, Office of INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR (approved March 25, 1936, revised January 12, 1965) (as amended May 31, 1985). Under this constitution, the president serves in both the legislative and executive departments, id. at art. XXII, § 1, appoints judiciary members, id. at art. XXVI, § 1, and heads the court of appeals, id. at art. XXVI, § 2.
33. See Rufina Marie Laws, A Premonition Fuels Mescalero Apache Struggle, RACIE, POVERTY, & ENVY, Spring/Summer 1995, at 34. Additionally, Joseph Gerommo, great-grandson of the legendary Apache warrior, says Chino "appoints the election board members. He counts the votes. It's like with Nonega or Castro. Do you expect them to lose?" Bryce, supra note 13, at 6.
34. Tom Meersman, Mescaleros' OK of Nuclear Waste Storage Site Pits Tribe Against New Mexico Officials, STAR TRIBUNE, March 11, 1995, at 1A.
35. See id.
37. See id. The three areas identified as potential stumbling blocks were liability, money and location. See id. It is rumored that the utilities wanted the Mescalero to waive its sovereign immunity so that it could be sued if anything went wrong. See id. In addition, the tribe was purportedly seeking to annex a parcel of land off the reservation but closer to the main rail line upon which the MRS was to be constructed. See id.
38. See Elaine Hiruo, NAC's Dams Say Prospects Dim for New Collective Utility Projects, NUCLEAR FUEL, May 6, 1996, Vol. 21:10, at 8. The tribe has already begun negotiations with a new prospective partner according to President Wendell Chino. See id. This new partner may be BNFL, Inc. or UMS, an international consortium including NAC, the only United States vendor with a licensed dual-purpose cask. See id.
governmental sovereignty, defined by the special position occupied by Native Americans with the United States government. This relationship provides the backdrop for the unfolding of a contemporary drama involving nuclear waste disposal on Indian land.

III. Origins of Federal Indian Law

In the words of Chief Justice John Marshall, the relationship between the Indians and the federal government is "unlike that of any other two people in existence." Arguably, this statement still rings true today. It is certainly true that the relationship that exists today is unique in comparison to the situation faced by any other contiguous group, ethnically, racially, or religiously, in the United States. This coexistence has been carved out of a history of expansion, the fulfillment of the nation's "Manifest Destiny," and the legal justifications found in Supreme Court jurisprudence and federal legislation.

A. History of Colonization

The colonization of North America has dictated the development of the peculiar relationship between Native Americans and the United States. Age-old European legal doctrines of discovery and conquest have been used to justify the imposition and transplantation of political, legal, economic, and social systems from Europe to the "New World." The impact of European settlement on Native America has quite obviously been substantial, and the implications for the native peoples of this continent continue today.

The devastation that colonization has wrought on Native American peoples may be similar to other colonial accounts in world history, but the legal relationship that has evolved out of "discovery" and the ensuing "conquest" between Native American nations and the United States government is unparalleled. From the infamous "Marshall Trilogy" arises a notion of inherent, albeit limited, sovereignty which Native American tribes possess to govern their own affairs. The struggle amongst states, tribes, and the federal government to define the extent of this sovereignty is ongoing, with the courts assuming the role of final arbiter in this dynamic arena.

Colonization did not end with the initial contact between those of European descent and those native to North America. The fruits of colonialism have fed the United States nuclear power industry and military complex for over 50 years. This "radioactive colonialism" has led to the destruction of sacred lands, pollution of water and air, and stockpiles of huge mounds of "mutagenic and carcinogenic" radioactive waste on reservations. This is exemplified in the use of Shoshone lands in Nevada for more than 650 U.S. atomic test blasts, leading Ward Churchill to dub the Shoshone the "most bombed nation on Earth."  

B. Native American Sovereignty

The current legal status of Native Americans is founded upon three United States Supreme Court decisions from the early nineteenth century, all authored by Chief Justice John Marshall. Known as the "Marshall Trilogy" these influential opinions are found in Johnson v. McIntosh, Cherokee Nation v. Georgia, and Worcester v. Georgia. These cases laid the groundwork for all future treatment of Native Americans in the United States legal system.

In Johnson v. McIntosh, the dispute concerned title to a tract of land which the plaintiffs purchased directly from the Piankeshaw Indians and to which the defendants claimed title by purchase from the federal government. The issue presented to the Court was whether the Indians had the authority to convey title or whether the right to convey had been obtained by the government in a treaty. Relying on the medieval doctrines of discovery and conquest, Marshall held that the United States obtained the exclusive right to extinguish the original tribal right of possession "by purchase or conquest." By using these doctrinal bases, Marshall recognized an aboriginal Indian title of possession, short of a fee interest, subject to a power to extinguish.
guish, exercisable by the United States government, since "[c]onquest gives a title which the Courts of the conqueror cannot deny." This "Indian title" is good against all but the conqueror, the federal government. The notion of independent tribal sovereignty was born in this decision, the significance of which is amplified since it was built on a recognized right to possession of land, a concept at the core of the Anglo legal system around which American society is organized.

The extent of tribal sovereignty was clarified in the other two cases of the trilogy, the Cherokee cases. The extent of state regulation of a Native American nation was at issue in Cherokee Nation v. Georgia. The case itself was dismissed on procedural grounds for lack of original jurisdiction because the Cherokee nation was not included among the parties enumerated in Article III, section 2, clause 1 of the Constitution. However, Marshall, in dictum, stated that Indian nations are not "foreign nations" but are instead "domestic dependent nations" and "wards" of the United States government to be protected. This language has been interpreted to establish the federal role as exclusive in the realm of Indian affairs, preventing state regulation of tribal action.

This "domestic dependent" status was clarified the following year in Worcester v. Georgia. In Worcester Chief Justice Marshall wrote that the Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive" and thus, Georgia laws "can have no force." He reiterated the dependent nature of the tribal-federal relationship, but implied that the tribes have exclusive authority to govern their internal affairs unless authority is otherwise delegated by Congress or treaty.

Thus, the Marshall trilogy established a base upon which all of federal Indian law has been built. Common to all three decisions is Marshall's intention to establish the preeminence of the federal government over the states in regulating Indian affairs. In a sense, from a Native American advocate's perspective, the opinions taken together indicate that Marshall gave the tribes inherent sovereignty. He applied centuries old legal doctrines to justify the United States' acquisition of title to all lands in the possession of Native American nations but at the same time, he incorporated their right of possession in the form of "Indian title" into the English-based system of property rights. He labeled the tribes wards of the federal government and domestic dependent nations but established that they have limited inherent sovereignty which may be exercised in the absence of congressional regulation. One thing is clear; these three monumental decisions laid the ground rules for all further interactions between Native Americans and the American legal system.

IV. Federal, State, and Native American Legal Conflicts

Tribal sovereignty is clearly not the only variable to be considered in the Mescalero Apache's attempts to locate a nuclear waste repository on their reservation. In fact, the exercise of Indian self-government operates subject to the supreme will of the federal government and, occasionally, as a separate state within the framework of state sovereignty. The interests represented in this tripartite system oftentimes come into conflict. As a result, analytical constructs have evolved to resolve such conflicts between sovereigns.

A. Federal-Tribal Relations

The relationship between the United States Government and the Native American peoples has never existed on a nation-to-nation level similar to what exists between the United States and foreign countries. From the outset of colonization by the Europeans, Native Americans have been subjugated under one foreign legal system or another. This system has served to provide a justification for federal policies ranging from forced removal, to assimilation, and even termination. Arguably, such policies are an outgrowth of a legal system which has been manipulated to suit the needs of the United States at the expense of Native Americans.

This repeated subjugation has taken its toll on notions of inherent powers of self-government in
Native Americans. Describing the state of Indian sovereignty today, one commentator has noted:

This vision of the separate, sovereign status of Native nations no longer describes the place of Indian peoples in American law. In derogation of their long-recognized powers of inherent sovereignty, Native Americans are today subject to the unlimited legislative authority of Congress to pass any law that it pleases, including those which restrict or eliminate the powers of Native governments. Due to the "plenary" nature of this power and the Supreme Court's concomitant judicial deference, the Court has rarely if ever limited the power of Congress since its first attempts to exert legislative power over Native people in the late nineteenth century. 58

Whether the power of Congress in legislating Indian affairs is indeed "unlimited" is subject to debate. However, the general tone of the above comment is well accepted in Indian law scholarship. 59

The power Congress wields is grounded in the Indian Commerce Clause. 60 One of only three points in the Constitution in which Indians are expressly mentioned, this clause authorizes Congress to "regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes. 61 The Supreme Court has often labeled this authority "plenary" in nature, enabling Congress to legislate Indian affairs in whatever way it sees fit. 62 Although "plenary" does not necessarily mean "absolute" since the exercise of this authority is subject to constitutional restraints and judicial review, 63 in reality this has not provided much of a check on Congress as the Court has allowed action ranging from the imposition of federal criminal law on reservations 64 to the widespread abrogation of treaties. 65

The development of congressional authority in Indian affairs is critical to determining whether federal environmental regulations apply to tribes. The power to include the tribes in such regulations is unquestionable. 66 General legislation clearly applies to Indian tribes when the statute expressly mentions them. 67 Additionally, if a general federal law requires national or uniform application, it will usually be construed to include Indian tribes. 68 However, questions of interpretation arise when Congress has been silent or ambiguous as to the extent of coverage and in its assignment of regulatory enforcement. 69 In resolving these questions, a court must find a clearly expressed congressional intent to rebut the presumption in favor of tribal sovereignty. 70 Any ambiguities in the statute being interpreted must be construed in favor of the tribe. 71

B. Tribal Power and Environmental Regulation

The extent to which tribes retain sovereign authority to regulate affairs on reservations is a significant factor in determining who holds the power of enforcement in environmental regulation. Recent Supreme Court case law has shed some light on this debate in the arena of tribal authority to enforce laws against non-members. These decisions, primarily in land use cases, have resulted in eroding tribal power. 72 Limitations on land use are significant because "a government that has lost the

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64. See United States v. Kagama, 118 U.S. 375 (1886).
65. See Lone Wolf v. Hitchcock, 187 U.S. 553, 555 (1903) (treaties do not limit Congress' plenary power over tribes).
66. See Gover and Walker, supra note 61, at 438.
67. See id.
68. See id.
69. See Williams, supra note 60, at 271.
70. See Gover and Walker, supra note 61, at 438.
71. Cohen, supra note 57, at 282.
72. See Sehgal, supra note 51, at 442.
authority to zone its lands—the authority to control land use planning—has lost as well the full capacity to control environmentally harmful land uses."

Although the Supreme Court has not directly confronted the issue of environmental regulation on Indian reservations, the rationale relied upon in reservation land use cases may indicate how the Court would resolve a case dealing with hazardous waste regulation.

In United States v. Mazure,
the question before the Court was whether Congress may properly delegate its regulatory authority to the tribes. The case involved the operation of a tavern by non-Indians on the Wind River Reservation without a tribal license. This violated a tribal ordinance, passed under the auspices of 18 U.S.C. section 1161, requiring both state and tribal liquor licenses. Relying on the Indian Commerce Clause, the Court held that Congress has primary authority to control the sale of alcohol on fee land within the boundaries of a reservation and a delegation of this authority to a tribal governing body is proper. Thus, the tribe did indeed have the power to subject a non-Indian landowner to the tribal ordinance.

Subsequently, the Court reiterated the validity of tribal exertion of civil regulatory authority over non-Indians on reservations in Montana v. United States. However, the Court found this power to exist only in a limited number of situations and established principles to guide courts in determining the extent.

The issue in Montana was whether the Crow tribe had the power "to regulate hunting and fishing by non-Indians on lands within its reservation lands owned in fee simple by non-Indians." Ruling against the Crow, the Court held that their inherent sovereign power was substantially restricted when asserted against non-Indians. In a narrow interpretation of the Fort Laramie Treaty, the Court also found that no authority was granted by treaty to the tribe to regulate the conduct of non-Indians.

In broad language the Court set forth the requisite analysis in determining the scope of tribal jurisdiction over non-Indians:

"To be sure, Indian tribes retain inherent sovereign power to exercise some form of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

The test, then, revolves around the rigid, but hard to define, standard that the conduct of non-Indians must be identified as directly affecting the "political integrity, the economic security, or the health or welfare of the tribe." The Court held that the regulation of hunting and fishing by non-Indians on non-Indian land did not satisfy these criteria and was invalid. The ultimate result of this loss of authority was a divestment of physical control of land that the Crow have relied upon for sustenance for centuries.

Several courts in subsequent cases have applied Montana to uphold tribal civil regulatory jurisdiction over non-Indians in the context of health and safety regulations and land use zoning. In addition, the Supreme Court affirmed the holding of Montana in

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73. Judith V. Royster, Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation, 1 Kan. L.J. & Pub. Pol'y 89 (1991) (discussing the similarities of land-use and environmental regulation and the obstacles to environmental control created by decisions of the Supreme Court).
74. See id.
75. 419 U.S. 344 (1975).
76. See Gover and Walker, supra note 62, at 441.
77. See id.
78. See id.
79. See id.
81. See Sehgal, supra note 51, at 443.
82. Montana, 450 U.S. at 547.
83. See id. at 558-559.
84. See Sehgal, supra note 51, at 443.
86. Id.
87. See Sehgal, supra note 51, at 444.
88. See id.
89. See Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1981) (Ninth Circuit upholding the Quinault Nation's enforcement of tribal health and safety regulations against a non-Indian operated grocery store on fee lands).
90. See Knight v. Shoshone and Arapahoe Tribes, 670 F.2d 900 (10th Cir. 1981). In that case the court upheld a zoning ordinance that the tribes had enacted to prevent non-Indians from subdividing and selling fee land for residential development. See id. at 901-02. The court held that the zoning code was justified in light of the tribe's interest in protecting their homeland from exploitation and the absence of land use control within the reservation without the code. See id. at 902.
Brendale v. Confederated Tribes and Bands of the Yakima Nation.\textsuperscript{91} The Court held that the Yakima did not have authority to impose the requirement of an environmental impact statement by zoning fee lands owned by non-members in the "open" area of the reservation.\textsuperscript{92} Justice White, writing for the Court, emphasized that the tribe's status as dependents of the United States government, a result of conquest, inhibited them from exercising extensive power over non-Indians on fee land.\textsuperscript{93} By recalling this language from the days of the Marshall Court, Justice White effectively undermined established principles of tribal inherent sovereignty that Chief Justice Marshall, himself, had constructed. Justice Blackmun, dissenting, wrote: "Time and again we stated that, while Congress retains authority to abrogate tribal sovereignty as it sees fit, tribal sovereignty is not explicitly divested except in those limited circumstances principally involving external powers of sovereignty where the exercise of tribal authority is necessarily inconsistent with the tribes' dependent status."\textsuperscript{94}

Blackmun criticized the Court for failing to adhere to established precedent defining the inherent sovereignty of Indian tribes and rejected their finding that Congress must expressly delegate tribal authority.\textsuperscript{95}

Several significant observations can be drawn from this line of cases. First, the present Supreme Court has clearly taken a hostile position regarding Native American sovereignty in the context of regulation of non-Indians. It appears that the prior notion that authority is retained by tribes over all aspects of self-governance unless expressly precluded by Congress has been left by the wayside as the Court opts to protect private landowners instead of tribal sovereignty. Clearly, when Congress explicitly delegates regulatory authority to Native American tribes the Court must uphold tribal regulation. Requiring such delegation as the means by which Native American nations gain the power to govern, however, is dangerous precedent and in effect has the potential to destroy what little meaning is still accorded the term "Indian sovereignty" in our legal system.

Practically, this case law creates the very real possibility of "checkerboard jurisdiction."\textsuperscript{96} This means that by restricting tribal authority to areas which are predominately Indian, states and counties would be allowed to assert jurisdiction over patches of reservations with a significant non-Indian population.\textsuperscript{97} Since pollution knows no borders, this inconsistent and inefficient form of governance in the area of environmental regulation could have disastrous effects.

C. State-Tribe Relations

In the context of nuclear waste disposal, the state-tribe conflict does not necessarily stem from an exercise of tribal authority, as opposed to state authority, to regulate non-Indians living on reservations. Instead, locating an MRS facility on Indian land involves a more direct clash challenging state police power in the realm of health and safety. B. Kevin Gover, a Native American lawyer and legal scholar, wrote in 1989:

In general, no person or activity is beyond the reach of federal environmental statutes or outside the jurisdiction of the state in which the person conducts his activity. However, special rules apply when the regulated person is an Indian or Indian tribe or the regulated activity takes place within Indian country.\textsuperscript{98}

His words take on great significance in the context of a highly political, emotionally charged issue like nuclear waste storage.

Do states (or should states) have a say in the siting of a nuclear waste repository on an Indian reservation? This is the key question in the debate over nuclear storage and the answer goes a long way towards determining whether the Mescalero's efforts are legally and politically feasible. If state law does not apply, tribes would seem to have the green light, absent contrary federal legislation, to embark on such an endeavor. It remains to be seen, however, whether federal officials have the willpower and the gumption to allow a nuclear waste repository to be constructed in the face of unanimous opposition from surrounding state and local communities.

Without an explicit assignment of jurisdiction to the states by Congress, state law is generally not applicable to Indian affairs within the confines of an

\textsuperscript{91} 492 U.S. 408 (1989).
\textsuperscript{92} See Sehgal, supra note 51, at 444.
\textsuperscript{93} See Brendale, 492 U.S. at 422-23.
\textsuperscript{94} Id. at 451-52 (Blackmun, J. dissenting)(citing United States v. Wheeler, 435 U.S. 313, 526 (1978); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-54 (1980)).
\textsuperscript{95} See Sehgal, supra note 51, at 445.
\textsuperscript{96} See Royster, supra note 73, at 91.
\textsuperscript{97} See id.
\textsuperscript{98} Gover and Walker, supra note 62, at 438.
Indian reservation.99 This proposition was initially advanced by Chief Justice Marshall in *Worcester v. Georgia.*100 This decision was based on two principles: first, that the Constitution delegated broad authority over Indian affairs to Congress; and second, that tribal self-government within Indian country was reserved by the Cherokee treaties, free from state intervention or interference.101 Both principles have been consistently adhered to by Congress and the Court.102 However, the latter, since it is more a matter of policy and judicial interpretation, as opposed to constitutional law, is subject to change as the political winds switch direction.103 The admittance of Indians as citizens in 1924 and the increasing number of non-Indians living on reservations have, at times, altered this policy, but the primary underlying rationale that Native Americans are independent of state regulation has been consistently upheld.104 Tribal autonomy has also been extended to and protected on all lands set aside by federal authority for Native Americans, not just those reservations established by treaty.105

However, this tribal autonomy has not operated as a complete bar to the exercise of state authority. In certain instances, courts have held that states have legitimate interests in regulating on-reservation activities.106 For example, in the aforementioned *Brendale* case, the Court allowed state regulation for zoning purposes in areas of a reservation that are predominately populated by non-Indians.107 The case of nuclear waste presents a particularly touchy balancing of state and Native American interests.

The extent of state control in Indian country is determined by the doctrine of preemption, which, as applied, has been highly protective of tribal sovereignty and allowed minimal application of state law.108 Two aspects of this doctrine apply in this context: federal preemption and Indian law preemption.109 Federal preemption is rooted in the Supremacy Clause of the Constitution and legislation passed pursuant to the broad commerce power.110 Under this doctrine, state and/or tribal police power is limited or precluded when Congress clearly occupies the field being regulated and state action, if allowed, would frustrate or interfere with Congress' purpose for the legislation.111

As has been described before, the Supreme Court, since the days of the Marshall trilogy, has followed a principle that the Constitution delegated authority over Indian affairs to the federal government.112 This delegation has led to the development of a unique body of Indian law consisting of treaties, executive orders, and statutes passed by Congress.113 In the context of preemption, Indian law is important in determining which of the three governments, Indian, state, or federal, has jurisdiction to police a particular matter.114 This unique body of law, in combination with the historical position that Native Americans have occupied as wards under the guardianship of the federal government, has resulted in broad preemption of state law in Indian country to protect and preserve Native American sovereignty.115 As the Court has stated, "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."116 Accordingly, federal statutes regulating Native Americans are interpreted in favor of retained self-government and property rights and against state law.117

With this context in mind, it should come as no surprise that modern preemption analysis in the arena of state versus tribal regulation has been conducted by the Supreme Court against a backdrop of "tribal sovereignty."118 This creates a presumption in favor of the tribe that a state must rebut for state law to apply on a reservation.119 A good example of this is found in the recent Supreme Court decision

99. See Cohen, supra note 56, at 259.
100. 31 U.S. at 515.
102. See id.
103. See id.
104. See id. at 261.
105. See id. at 267.
106. See Williams, supra note 60, at 272.
107. See Sehgal, supra note 51, at 444.
108. See Cohen, supra note 56, at 270.
109. See Collins, supra note 21, at 335.
110. See id. The extent of the commerce power, however, is currently being reined in light of the decision last term in United States v. Lopez, 514 U.S. 549 (1995).
111. See id.
112. See Cohen, supra note 57, at 270.
113. See id.
114. See Collins, supra note 21, at 335.
115. See Cohen, supra note 57, at 273.
118. See Williams, supra note 60, at 272.
119. See id.
in *California v. Cabazon Band of Mission Indians.* This case dealt with the issue of state regulatory jurisdiction over gaming on reservations. Ruling that state regulation was impermissible, the Court held that state jurisdiction is preempted if it “interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.” Although somewhat circular, this approach can be characterized as a classic example of the Court’s balancing test. Here the test is applied in the context of the legitimacy of the state’s interest versus the burden placed on the regulated tribe and/or the threat that state regulation will undermine the goal of federal legislation. The Court has been careful to emphasize, however, that in answering this balancing question, the “backdrop” of tribal sovereignty and policy decisions of Congress and the executive, such as encouraging economic self-sufficiency, must be given substantial presumptive weight.

So far, the application of state environmental laws on reservations has been prevented by the courts. In *Washington Department of Ecology v. United States Environmental Protection Agency,* the Ninth Circuit held that the EPA acted properly in disapproving the attempt to include Indians in a state management program proposed pursuant to the Resource Conservation and Recovery Act (RCRA). The Court observed that the EPA administrator reasonably interpreted RCRA as failing to grant “state jurisdiction over the activities of Indians in Indian country.” Notably, the court stated:

> [t]he federal government has a policy of encouraging tribal self-government in environmental matters. That policy has been reflected in several environmental statutes that give Indian tribes a measure of control over policy-making or program administration or both. The policies and practices of EPA also reflect the federal commitment to tribal self-regulation in environmental matters.

The weight accorded tribal self-government by the court is significant in that it essentially gave the green light to EPA to pursue its advocacy of self-government for tribes in environmental regulation.

A case illustrating modern preemption analysis in the context of the NWPA is *Nevada v. Watkins.* This case, also from the Ninth Circuit, involved legislation enacted by the State of Nevada to prohibit the building of a permanent nuclear waste repository, making it unlawful to store high-level radioactive waste within the state’s borders. After the Secretary of Energy ignored this statute and proceeded with site characterization, Nevada brought suit. Neither side contended that Congress had preempted the field of nuclear waste disposal under NWPA, and the court stated that the Supreme Court had not yet addressed this issue. However, the Ninth Circuit held that “Nevada’s attempted legislative veto of the Secretary’s site characterization activities is preempted by the NWPA.” As an underlying rationale, the court cited the Supremacy Clause of the Constitution, stating that it invalidates “any state legislation which frustrates the full effectiveness of federal law.”

The Ninth Circuit in *Watkins* also relied on the Supreme Court’s decision in *Pacific Gas and Electric v. State Energy Resources Conservation.* This decision is important because it established that the federal government has occupied the field of nuclear safety regulation under the Atomic Energy Act. Despite this, the Court ultimately held that the California statute conditioning nuclear power plant construction on a long-term waste storage system was an “avowed economic purpose” and “outside the occupied field of nuclear safety regulation.” Although PG&E does not expressly deal with the NWPA, the reasoning is certainly analogous in the context of the federal government’s occupation of the field of nuclear safety regulation.

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121. Id. at 214-15.
123. See Gover and Walker, supra note 62, at 439.
124. See id.
125. 752 F.2d 1465 (9th Cir. 1985).
126. See Gover and Walker, supra note 62, at 440.
128. Washington Department of Ecology, 752 F.2d at 1469.
129. Id. at 1471.
130. 914 F.2d 1549 (9th Cir. 1990).
131. See Collins, supra note 21, at 285.
132. See Nevada, 914 F.2d at 1561.
133. Id.
134. Id.
136. See id. at 211-15.
137. Id. at 216.
These cases have several significant implications for the Mescalero Apache and their attempts to site an MRS facility on their reservation. Since the Supreme Court has not considered whether the NWPA occupies the field of nuclear waste disposal, it has not settled exactly who should prevail in a struggle over regulatory authority if the State of New Mexico attempts to challenge the Mescalero project. It is clear that tribal self-government is a factor given great weight in determining the lawful regulating body. This is evident in both the Cabazon Band and Washington Department of Ecology decisions. In addition, the Watkins decision indicates that the courts may be inclined to interpret the NWPA as occupying the field of nuclear waste disposal and at the very least that any attempts by New Mexico to frustrate the purpose of the NWPA would be preempted. Thus, if the Mescalero act pursuant to provisions of this statute and within the bounds of their traditional sovereignty, their chances of prevailing in court are substantially enhanced.

Also important is the court's emphasis on balancing interests around current federal policy when deciding whether Indian self-government should be allowed. Not only has the federal government pursued a policy of economic self-sufficiency for Native American tribes for over a century, but recent administrations have specifically endorsed Indian self-determination as well. Assuming the federal government would adhere to these policies, the Mescalero would have an even stronger foundation on which to base their defense.

D. Tribes as States for Purposes of NWPA?

The missing piece of the puzzle in the above debate over the lawful exertion of state jurisdiction in Indian country versus Native American self-government is how the NWPA actually defines the roles of these respective parties in the nuclear waste disposal context. The scope of the statute itself could be determinative of the Mescalero Apache's success in locating a repository on their reservation.

The 1987 Amendments to the NWPA contained the following language:

all affected States and Indian tribes should be treated equally, and no single state or tribe should enjoy an advantage over another. The Committee believes that this equality of treatment is an essential element in assuring the continued cooperation of all the States that will be considered as having potentially acceptable sites for these facilities.

This obviously indicates that an explicit goal of the Amendments was to place states and Indian tribes on equal footing in the siting of a repository.

Explicit provisions within both the Low-Level Radioactive Waste Policy Act of 1980 and the NWPA establish that states and tribes have equal rights to host a facility and to object to the siting of such a facility within their jurisdiction. Objection can take one of two forms for each of the sovereigns: disapproval and consultation. The former is essentially a veto power over sitting on land within a state or tribe's jurisdiction that can only be overrid-


139. Both the Reagan and Bush administrations endorsed self-determination, characterized in a policy of "government-to-government relations" See President's Statement on Indian Policy, Pub. Papers 96-100 (Jan. 24, 1983) (stating that the Reagan administration's policy is to "reaffirm dealing with Indian tribes on a government-to-government basis").

140. It is worth noting that New Mexico is already the host of the Waste Isolation Pilot Plant (WIPP) which will be the single permanent repository for all military generated radioactive waste. See Collins, supra note 21, at 281. Recently, the EPA issued a tentative rule that the Department of Energy could safely store radioactive garbage from a number of federal sites across the country in an underground repository 300 miles southeast of Albuquerque. See EPA Rules Radioactive Garbage Can Be Stored at New Mexico Site, SAN FRANCISCO CHRONICLE, October 24, 1997, at A4. As a practical matter, this could potentially have great influence both politically and in the courts, creating pressure to succumb to New Mexico state officials' arguments that two radioactive waste repositories are enough.

141. S. Rep. No. 282, 97th Cong., 1st Sess. (1981). The goal to treat tribes and states as equals is also illustrated by the floor debate:

Mr. Synar: Are Indian tribes treated differently from states in this legislation?
Mr. Udall: No. The governing bodies of affected Indian tribes are treated the same as state governments. The difference arises not in this bill but in the existing federal authority to acquire land. In the case of Indian trust lands, however, existing law would not give DOE the express authority to acquire or condemn Indian trust land. Such action would require either the consent of the tribe whose land is involved or an explicit act of Congress dealing with the lands of that specific tribe. 128 Cong. Rec. 26910 (1992) (statements of Rep. Synar and Rep. Udall, quoted in Collins, supra note 21, at n.377).


143. See NWPA § 115(b) (codified as amended at 42 U.S.C. § 10135(b) (1995)).

144. See, e.g., Participation of States, NWPA § 116 (codified as amended at 42 U.S.C. § 10136 (1995)).

145. See, e.g., Consultation with States and Indian Tribes, NWPA § 117 (codified as amended at 42 U.S.C. § 10137 (1995)).
den by an act of Congress. Consultation allows sovereigns affected by repositories slated to be sited on nearby land the right to express comments to and register objections with the federal government, but in no way provides a veto. Since New Mexico has no jurisdiction over reservation lands, except in limited instances where such lands are owned by non-Indians, objection by disapproval is not available. In fact, the NWPA specifically provides that states have no right to disapprove a proposed nuclear waste repository on Indian land.

As Chuck Lempesis, chief of staff in the Office of the Nuclear Waste Negotiator, said: "[t]he Indian tribes in the statute are treated as sovereign entities. Let me put this to rest: [t]here simply is no veto [available to the states]."

The right of consultation is the only avenue, then, provided by NWPA, through which the State of New Mexico can register its objections to the Mescalero project. This limits the state's influence to the exertion of pressure on Congress in the hopes that Congress enacts legislation stopping the Mescalero in their tracks.

The real effect of such political dissent should not be underestimated. Objections from states, particularly the State of New Mexico, and citizen groups, led to the 1994 Bingaman Amendments to the NWPA. These changes eliminated the funding for the Phase II-B grant program to study the feasibility of siting a monitored retrievable storage facility. This is significant because the Mescalero were one of only a handful of sovereigns, all tribes, that had reached this stage of the process and upon reaching it, the program was eliminated. This illustrates the real-world inequality between states and tribes that remains despite the express directives of the NWPA. The fact that pressure from the New Mexico congressional delegation was so easily able to thwart the MRS process, ignoring the prescribed channels in the statute of disapproval and consultation, calls into question how much reliance can be placed on the provisions of the statute. As a result, the words endorsing equality, government-to-government relations, and sovereignty in the NWPA seem meaningless in the political reality of storing nuclear waste.

Upon being spurned, the Mescalero decided to look elsewhere, using the knowledge they had gained during their participation in the formal MRS siting process. The result was that a private venture to build an MRS was born. The NWPA, however, does not contemplate the construction of such a project since it was established to build an MRS as part of a government program. The pursuit of a private facility, then, presents a number of interesting questions that have yet to be answered.

Authority to construct and regulate such a private repository is just one of many concerns that have not been addressed. Exactly which provisions of the existing NWPA would apply is also unclear. A permit to operate would most likely be required from the federal government, possibly from the Nuclear Regulatory Commission, but whether state permits would also be required adds an interesting slant to the preemption question. Assuredly, conflicting external pressures from the nuclear industry desperately in need of a storage facility and from states such as New Mexico that are justifiably afraid of transporting and storing radioactive waste within their boundaries, will have an impact on any private attempts to build a repository. The limited scope of this note does not allow an in-depth analysis of the legal implications of constructing an MRS as part of a private venture.

V. Environmental Justice

In the past decade, a variety of groups have been mobilized to fight against the siting of landfills, hazardous waste dumps, cogeneration and incineration facilities, and other producers of toxins or sources of blight near communities consisting predominately of members of minority groups. This community-based organization has prospered under the moniker of the “environmental racism” or “environmental justice” movement, and has been successful in preventing the construction of facilities in undercapitalized places around the country.

146. See id.
147. See id.
148. "The authority of the Governor or legislature of each State under this subsection shall not be applicable with respect to any site located on a reservation. NWPA § 116(b)(3) (codified as amended at 42 U.S.C. § 10136(b)(3) (1995)). Section 116(b)(3) is applicable to an MRS siting. NWPA § 141(h) (codified as amended at 42 U.S.C. § 10161(h) (1995)).
149. See Who will host an MRS? An Indian Tribe, Perhaps,
150. See Collins, supra note 21, at 333.
151. See id.
152. See id.
153. See id.
154. See Bryce, supra note 13, at 6.
155. See id.
Indian reservations have increasingly become the target of these types of facilities.\textsuperscript{156}

A. Environmental Justice Defined

In order to analyze the placement of a nuclear waste disposal facility on the Mescalero Apache reservation in the context of the environmental justice movement, a workable definition of the terms involved is needed. Scholars have differed in their definition of these concepts. Robert Bullard, a pre-eminent contributor to this scholarship, defines environmental racism as "any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color."\textsuperscript{157} A more tangible definition of environmental racism, perhaps, is "the practice of placing toxic waste and other environmental hazards at sites in neighborhoods primarily populated by people of color—African Americans, Hispanics, Asian Americans, and Native Americans."\textsuperscript{158} One final definition is an environmental practice that "contributes to the structure of racial subordination and domination that has similarly marked many of our public policies in this country."\textsuperscript{159} Environmental justice is essentially the name for the movement that has grown out of the struggle against the implementation of decisions made as a result of environmental racism. The basic tenet of environmental justice advocates is that everyone should have to bear equally the environmental burdens imposed by modern society.

B. The Mescalero, a Target of Environmental Racism?

In the context of nuclear waste disposal on Indian reservations, charges of environmental racism seem justifiable. However, the situation is much more complex than it may seem at first glance. Undoubtedly, the economic situation in which most tribes find themselves would lend credence to the notion of exploitation by the nuclear power industry dangling dollar signs as the proverbial carrot. The Mescalero Apache, on the other hand, have obtained a degree of financial security and as a result, allegations of coercion are not as well founded.

Empirically, it appears that Indian tribes have been disproportionately targeted to be the host of an MRS under NWPA. Of the twenty applicants for Phase I MRS grants under the NWPA (prior to the Bingaman Amendments of 1994), sixteen were Indian tribes.\textsuperscript{160} The only entities to proceed beyond this initial phase are Indian tribes. It is telling that the federal grant money, in addition to the millions in prospective revenues from hosting a nuclear waste repository, has enticed only Native American nations.\textsuperscript{161} One possible explanation is that states have been unwilling to assume the health risks that accompany the construction of an MRS and the transportation of nuclear waste to such a facility. Another, however, is that the process has been geared towards sovereigns with a sparsely populated land area and a susceptibility to promises of financial security.

An additional factor in this debate, specific to the case of the Mescalero, is the role that the nuclear power industry has played in recruiting potential storage space for its overflowing holding pools. The Mescalero tribal council's primary consultant throughout their solicitation of an MRS has been Pacific Nuclear of Federal Way, Washington.\textsuperscript{162} This company designs and constructs storage containers for spent fuel and quite obviously would have great interest in the successful acquisition by the Mescalero of a permit to begin construction of an MRS.\textsuperscript{163}

C. Land as Culture: A Perspective Ignored?

Seemingly lost in the discussion surrounding the Mescalero facility is a perspective that can be labeled more traditional in its approach to the land. This perspective is apparent in the words of Rufina Mane Laws, a Mescalero Apache activist who opposes the MRS Project who says, "[w]e are commanded by our heritage as Mescalero Apache people to maintain the purity of our sacred legacy. It is our duty to protect this precious gift which has been handed down through the ages."\textsuperscript{164} The sacred and precious gift of which she speaks is the land itself.

\textsuperscript{156} More than three dozen reservations have been solicited for landfills, incinerators, and other waste facilities. See Robert D. Bullard, The Legacy of American Apartheid and Environmental Racism, 9 ST. JOHN'S L. REV. 839, 840 (1992).

\textsuperscript{157} See Collins, supra note 21, at 300.

\textsuperscript{158} See Erickson, supra note 3, at 92.

\textsuperscript{159} See id.

\textsuperscript{159} See id.

\textsuperscript{160} See id.

\textsuperscript{161} See id.

\textsuperscript{162} See Collins, supra note 21, at 300.

\textsuperscript{163} See Ms. Laws has actively lobbied against the MRS project supported by the Tribal
For many tribes, considering the unemployment rates and poverty on reservations, their most precious commodity is their land base. However, this characterization as a commodity is infused with a European approach to property. Most Native Americans view land in a very different way, as central to their culture and religion. Conversely, communal rights in land are not well accepted in the American legal system. As a result, sacred sites and location-based religions do not receive the degree of protection that Judeo-Christian religions receive under the First Amendment.

The Mescalero share a bond with their land long before Europeans arrived on the shores of North America. Their land base has a history and meaning for them all its own. Today however, the tribal administration is being criticized by Rufina Marie Laws and others for using their land as a resource, adopting the European orientation towards property. Those in Ms. Laws' corner believe the land should be protected to preserve their culture and traditions for future generations. In response, President Chino and the Tribal Administration see the MRS facility as an opportunity to ensure the tribe's future into perpetuity. The tribe must resolve the potentially grave consequences of such a difficult decision. Fortunately, making that decision, all perspectives within the tribe are given full consideration.

Thus, the question of whether environmental racism has influenced the location of a nuclear waste disposal facility in this instance is subject to debate. The process has resulted in locating potential sites exclusively on Indian reservations. Additionally, outside influences, like Pacific Nuclear, raise serious doubts that the process is being compromised by the self-interested nuclear power industry. An important consideration in contrast, however, is whether questioning the Mescalero's exercise of their sovereign power in making the decision to pursue a nuclear waste repository is inherently racist in itself. Stating that the siting process and Pacific Nuclear are taking advantage of the Mescalero, assumes that they are helpless and in need of outside direction to "show them the way." Native American nations have been trying to break free from the bonds of colonialism for centuries to exercise their sovereignty. Therefore, it is important to avoid paternalistic impulses when analyzing the Mescalero Apache's ultimate decision.

VI. Self-Determination

Self-determination for Native Americans has been repeatedly encouraged as a federal government policy for the past sixteen years. Suddenly halting the endorsement of this policy to prevent the Mescalero from building an MRS would be incredibly hypocritical. Such favoritism to the wishes of the State of New Mexico would seriously undermine the credibility of the federal government in its attempts to encourage Indian self-sufficiency.

Several aspects of Indian law support an endorsement of self-determination in this context. First, if Indian sovereignty is to be accorded its true meaning, tribes must be allowed to make decisions affecting their land. These decisions about controlling their land-base, although still subject to approval by Congress, are crucial to a tribe's viability as a separate sovereign. Second, the NWPA itself, explicitly treats tribes as states for the purposes of its provisions. Allowing the State of New Mexico to veto the siting of an MRS is a clear violation of the NWPA directives. Finally, a private business venture of this magnitude, between the Mescalero and nuclear power utilities nationwide, is in accord with the government policy of encouraging economic self-sufficiency for Native Americans. Hosting an MRS, despite the obvious health and safety risks, is a tremendous opportunity for tribes to guarantee their future.

There are some problems with the Mescalero situation that should be considered. First, the allegations of corruption in the tribal referendum over the MRS proposal are serious. Questions remain to be answered by Mr. Chino and his tribal council regarding the dramatic shift in voting. Absent any wrongdoing, the tribal will should be given full support.

Second, there are legitimate safety concerns

Amendment. She has been driven by a vision she had in July 1990 of an inescence stream of hot, toxic material killing everything in its path. Ms. Laws believes this vision is what drive of their reservation if nuclear waste is accepted by the Mescalero. See id.

165. See generally THOMAS R. BERGER, VILLAGE JOURNEY, 73-95 (Hill and Wang 1985). In many Native American religions, man is considered merely a constituent of the natural world as opposed to the Judeo-Christian tradition which places man above nature and views the natural world as subject to man's dominion. See Richard Herz, Legal Protection for Indigenous Cultures: Sacred Sites and


166. See Herz, supra note 165, at 699.


168. The Clinton Administration, through the former Secretary of Energy, Hazel O'Leary, and the nuclear waste negotiator, has expressed its support for a tribal MRS site. See Erickson, supra note 3, at 98. See also text accompanying note 139.
regarding the construction and operation of a nuclear waste facility, regardless of its location. The utmost care must be taken to safeguard the health of the surrounding communities and the environment. To this end, the federal government must cooperate with and monitor the Mescalero, even in a private venture, sharing technology and ensuring that the most stringent performance standards are met. The Mescalero must exhibit a commitment to construct the safest facility possible and enact tribal environmental regulations to achieve this degree of safety. It would be folly to expect the Mescalero to overlook this since they are directly at risk and self-protection is the highest of priorities.

Charges of environmental racism in the siting process have a legitimate role in the discussion as well. Those in the debate would do well, however, to be mindful of the caveat issued by one Native American legal scholar who says: “This is what we find troubling in the ‘environmental racism’ issue. Too often, the environmental community appoints itself the officious protector of the Indians.”

VII. Beyond Self-Determination: The Obstacles Ahead

One scholar in addressing the Mescalero’s situation has determined that the environmental justice movement and self-determination are not inherently at odds. Louis Leonard has argued that environmental justice concerns reinforce the Mescalero’s right to self-determination through informed decision-making. Assuming his conclusion is correct and the Mescalero are given the go-ahead to pursue an MRS facility within their powers of self-determination under federal supervision, there are a number of obstacles, legal and otherwise, that remain to be confronted.

A. Possible State/Local Regulation of Nuclear Waste Transportation

The regulation of transportation of nuclear materials across state lines and within the State of New Mexico is a potential limitation on the Mescalero’s successful operation of a facility. The primary issue involved is whether the State of New Mexico can regulate and/or prohibit the transportation of the nuclear wastes bound for the Mescalero’s facility on its highways and railways. Such regulation, if admissible, could render the proposed MRS obsolete.

The Ninth Circuit in Nevada v. Watkins, discussed above, held that the NWPA was preemptive of Nevada’s attempts to keep an MRS outside the state lines. This indicates an orientation towards interpreting NWPA provisions as preemptive of state action in the field of nuclear safety regulation. However, in the context of the regulation of transportation, NWPA is not controlling. The NWPA expressly provides that “nothing in this chapter shall be construed to affect federal, state or local laws pertaining to transportation of spent nuclear fuel or high-level radioactive waste.” Therefore, by its own terms, the NWPA allows existing law regarding transportation of waste to stand.

Existing law is not particularly clear, however, in assigning jurisdiction. Federal jurisdiction over the transportation of nuclear waste, to the extent that it is available, is provided by the Atomic Energy Act (AEA)173 the Hazardous Materials Transportation Act (HMTA)174 and its companion, the former Federal Railroad Safety Act (FRSA).175 The NRC and the Department of Transportation (DOT), respectively, are vested with the authority to enforce these acts. Also at play in the context of state regulation of waste transport are the preemption doctrines outlined supra, specifically federal preemption of state law based on the Supremacy and the Commerce Clauses of the Constitution.

Assuming for the sake of this discussion that the State of New Mexico passes a law placing an outright ban on the transportation of nuclear waste of any kind on its interstate highway system, or alternatively, that a permit and fee system is imposed on those who wish to transport such wastes, it is clear that such regulations create a clash between the requirements are imposed on the Secretary of Energy. More specifically, the requirements apply to the proposed government facilities in Area 25 in Nevada and at Yucca Mountain. Presumably, like requirements could be promulgated if and when the Mescalero apply to the NRC for a license to operate a storage facility. More, however, this is all pure speculation since both bills have yet to be enacted into law. See S. 104, 105th Cong., 1st Sess. §§ 202-203 (1997); H.R. 1270, 105th Cong., 1st Sess. §§ 202-203 (1997).

172. Pending legislation before both Houses of Congress to amend the NWPA include language that would impose certain delineated requirements for safe transportation of nuclear waste to the interim and permanent storage facilities to be constructed in Nevada. There is nothing in the bills, however, that appears to impose like requirements on a private MRS facility since the state regulations create a clash between the federal, state or local laws pertaining to transportation of spent nuclear fuel or high-level radioactive waste.” Therefore, by its own terms, the NWPA allows existing law regarding transportation of waste to stand.

Existing law is not particularly clear, however, in assigning jurisdiction. Federal jurisdiction over the transportation of nuclear waste, to the extent that it is available, is provided by the Atomic Energy Act (AEA) the Hazardous Materials Transportation Act (HMTA) and its companion, the former Federal Railroad Safety Act (FRSA). The NRC and the Department of Transportation (DOT), respectively, are vested with the authority to enforce these acts. Also at play in the context of state regulation of waste transport are the preemption doctrines outlined supra, specifically federal preemption of state law based on the Supremacy and the Commerce Clauses of the Constitution.

Assuming for the sake of this discussion that the State of New Mexico passes a law placing an outright ban on the transportation of nuclear waste of any kind on its interstate highway system, or alternatively, that a permit and fee system is imposed on those who wish to transport such wastes, it is clear that such regulations create a clash between the requirements are imposed on the Secretary of Energy. More specifically, the requirements apply to the proposed government facilities in Area 25 in Nevada and at Yucca Mountain. Presumably, like requirements could be promulgated if and when the Mescalero apply to the NRC for a license to operate a storage facility. More, however, this is all pure speculation since both bills have yet to be enacted into law. See S. 104, 105th Cong., 1st Sess. §§ 202-203 (1997); H.R. 1270, 105th Cong., 1st Sess. §§ 202-203 (1997).

172. Pending legislation before both Houses of Congress to amend the NWPA include language that would impose certain delineated requirements for safe transportation of nuclear waste to the interim and permanent storage facilities to be constructed in Nevada. There is nothing in the bills, however, that appears to impose like requirements on a private MRS facility since the state regulations create a clash between the federal, state or local laws pertaining to transportation of spent nuclear fuel or high-level radioactive waste.” Therefore, by its own terms, the NWPA allows existing law regarding transportation of waste to stand.
inherent police power guaranteed the State of New Mexico to protect the health and safety of its citizens and the burden they might create on interstate commerce and/or federal legislation occupying the same regulatory field. Addressing this clash, one scholar found that even a complete ban could be a lawful exertion of state police power.\textsuperscript{177} In arriving at this conclusion, Baum first pointed out that the AEA is devoid of an express preemption of state regulation. Next, he argued that a total ban does not make it physically impossible to comply with both the AEA and the state regulation because shipments of nuclear waste are not required under the act. Instead, the AEA simply regulates how such shipments should be carried out if a possessor of nuclear waste were to opt to move its wastes off-site.\textsuperscript{178} Third, Baum asserted that implied preemption analysis is not definitive either.\textsuperscript{179} Finally, he concluded that a non-discriminatory regulation in combination with a state safety interest that is more than illusory would be likely to survive a challenge based on the “dormant” Commerce Clause.\textsuperscript{180} A discriminatory regulation, according to the Supreme Court, is a ban that prohibits transportation of waste into the state but allows intrastate transport, thus, placing an undue burden on interstate commerce.\textsuperscript{181}

Here, the State of New Mexico would certainly have a greater than illusory safety interest. But it would be next to impossible to craft a ban that would be non-discriminatory. With one and possibly two nuclear/radioactive waste sites already destined for New Mexico, a ban of transportation of in-state waste is not feasible. In fact, since much of the waste originates from out-of-state federal facilities, the ban, to have any effect, would have to address waste crossing state lines. Such a ban would unseat the “dormant” Commerce Clause which almost certainly would preclude a complete ban on nuclear waste transportation as an undue burden on interstate commerce.

Since a complete ban is rather unlikely to withstand a Constitutional challenge, the more realistic approach to regulation is through permits and fee requirements. State or local regulations of nuclear waste transport that fall within the ambit of the NRC are most likely preempted under the AEA if grounded solely on a safety rationale.\textsuperscript{182} Transportation permit and fee requirements are yet to be excluded by the dormant commerce clause analysis or preempted by federal law, including the HMTA.\textsuperscript{183}

The primary purpose of the HMTA is to ensure a uniform development of national regulations for hazardous material transportation and to avoid a “multiplicity of state and local regulations.”\textsuperscript{184} Under the HMTA, requirements of a state, political subdivision thereof, or Indian tribe is preempted if complying with both the HMTA and the state requirement is impossible or if the state requirement “is an obstacle to accomplishing and carrying

\textsuperscript{180}. See Baum, supra note 177, at 689-90.

\textsuperscript{181}. See generally Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981). Additionally, there is a line of decisions in which various types of state restrictions on the transportation of waste has been found to be discriminatory under the “dormant” Commerce Clause. See Philadelphia v. New Jersey, 427 U.S. 617 (1978) (found unconstitutional a New Jersey law banning the importation of waste generated outside the state); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992) (a Michigan law prohibiting private landfill operators from accepting wastes from outside the county of operation was discriminatory); Oregon Waste Systems, Inc. v. Oregon Dep't of Envtl. Quality, 511 U.S. 93 (1994) (a differential fee higher for out-of-state was discriminatory).

\textsuperscript{182}. See Goldberg, supra note 176, at 400. The decision in Pacific Gas & Electric Co. is determinative of this point. 461 U.S. 41 (1983). See also Illinois v. G.E., 683 F.2d 206, 215 (7th Cir. 1982), Washington State Building and Construction Trades Council v. Spellman, 684 F.2d 627, 639 (9th Cir. 1982). Both of these decisions interpreted the AEA to preempt state regulations prohibiting the transportation and in-state storage of spent nuclear fuel generated outside the state. See id.

\textsuperscript{183}. Goldberg, supra note 173, at 400.

\textsuperscript{184}. National Tank Truck Carriers, Inc. v. Burke, 608 F.2d 819, 824 (1st Cir. 1979). This does not mean, however, that all state regulation is precluded.
out this chapter." The DOT makes these determinations. In practice, the DOT has found most state, or local requirements to be inconsistent.

Case law and DOT's inconsistency rulings regarding fees and permits indicate that those may be feasible forms of state and/or local regulation. For the Mescalero, this could have significant impacts on the operation of a private waste facility. Although not devastating, as would be the case of a complete ban on highway transportation, the effects of New Mexico permits and fees for use of its highway system could do two things. First, additional fees drive up the price of transport, which, in turn, would either cut into the Mescalero's profit margin or increase costs to the nuclear utilities. Second, such regulations could have psychological and political effects that could potentially scare off customers fearful of state and local antagonism. A hostile environment could create a public relations nightmare for utilities already suffering from criticism from consumers concerning rates and from environmentalists rallying for cleaner forms of renewable energy. Although such concerns are valid, they are unlikely to inhibit utilities facing an impending crisis for nuclear waste storage.

The most likely route for waste to take to the Mescalero reservation, however, is by rail. The FRSA has been interpreted to have a "total preemptive intent" of state rail safety standards. Fee and permit requirements are not, however, prescribed by FRSA, and state requirements in these areas have not yet been fully addressed by the courts.

In sum, a ban by the State of New Mexico on nuclear waste transport is almost certain to be invalid under the dormant commerce clause or the AEA, particularly if primarily intended as a safety regulation. Fee and permit requirements are more likely to survive constitutional and statutory scrutiny under the FRSA and the HMTA. For the Mescalero, the imposition of such requirements is not of such a nature as to prevent them from going forward with their project. It could, however, rise to a level of significance by decreasing profits and deterring potential customers. Additionally, ceding control over any aspect of the MRS facility to the State of New Mexico is unwise. Even a small concession could erode whatever public confidence exists in the safety of the Mescalero project and set the precedent for further state encroachment.

In light of this, the Mescalero should beat New Mexico to the punch and enact its own set of stringent regulations. This would serve a dual purpose of bolstering their own case in the eyes of federal government and placating state and local officials and communities. Although it is true that waste would be traveling across state lines before it arrives on the Mescalero reservation, strict tribal transportation regulations communicate the serious nature of the endeavor and set the example for the type of regulations that New Mexico could enact. While still conceding to the regulatory community to a certain extent, at least this would allow the Mescalero the opportunity to define the debate.

B. NRC Permit Requirement for a Private MRS Facility

Another potential obstacle to the Mescalero MRS facility is obtaining a permit from the NRC to began operation and acceptance of wastes for storage. The NWPA, at least prior to recent attempts to amend it, is devoid of reference to a private waste facility in terms of the requirements and regulations to which the facility would be subject, a procedure for bringing it into operation, or even affirmative authorization for the existence of such facilities. Prior to the 1994 Amendments, nuclear waste storage was never contemplated outside of the government area. Since these Amendments and the Mescalero's subsequent decision to proceed in a private venture, without the grant program, the federal government has moved to address this possibility.


186. See Goldberg, supra note 176, at 393-94, 409.

187. See id. at 401-06. In New Hampshire Motor Transport Association v. Flynn, 751 F.2d 43, 51-52 (1st Cir. 1984), the First Circuit held that a license-fee system did not violate the Commerce Clause and was not inconsistent with the HMTA. Therefore, the license-fee was not preempted. See id.

188. President Chino has made no attempts to hide the Mescalero's proximity to a major rail line. Instead, he has trumpeted this as one of the advantages offered by the Mescalero project. See Hiru, supra note 38, at 8.

189. See National Ass'n of Regulatory Util. Comm'rs v. Coleman, 542 F.2d 11, 13 (3d Cir. 1976); see also Burlington N. R.R. Co. v. Montana, 880 F.2d 1104, 1106 (9th Cir. 1989); Peters v. Union Pac. R.R., 80 F.3d 257, 262 (8th Cir. 1996)(state laws are expressly preempted when the Secretary of Transportation has promulgated regulations on the same subject matter). It is worth noting, however, that there is an exception for local regulation of "local hazards" as long as such regulation is not incompatible with the federal laws and regulations, and as long as the state and local regulations do not impose an unreasonable burden on interstate commerce. See 49 U.S.C. §§ 20105, 20106 (1997).

190. See Goldberg, supra note 176, at 400. There have been a few cases decided since the writing of Goldberg's article which have dealt with certain aspects of state permit regulations on the railways. However, it remains an unsettled area of law.
In 1995 the NRC issued a final rule amending its regulations for the licensing of an MRS facility.191 The amendments emphasize the emergency response capabilities that are necessary for an MRS to be licensed. These amendments completed the licensing requirements in Part 72 of Chapter 10 of the Code of Federal Regulations which apply to any MRS licensed by the NRC. While not expressly addressing private MRS facilities, it is highly likely that a private facility on the Mescalero reservation would be required to satisfy NRC regulations.

Additionally, the issue of a private waste facility was addressed in several versions of legislation introduced in Congress this year to amend the NWPA of 1982. For example, in one version of H.R. 1270, private facilities are explicitly encouraged and the NRC is directed to issue a license to any private applicant that meets the "applicable provisions of law and regulation."192 This bodes well for the Mescalero, should this bill be enacted into law.

The signs from Congress that private MRS facilities should be supported is a positive sign for the Mescalero that when they are prepared to submit an application for NRC licensing, their application will be welcomed and given serious consideration. Unlike other aspects of the creation of a private MRS facility, there is no mystery in the licensing process. The requirements are set out clearly in Part 70 of Chapter 10 of the Code of Federal Regulations. All the Mescalero have to do is follow the guidelines. With the appropriate amount of federal assistance, consultation with their private partners and continued support within the tribe, such a license does not present an insurmountable obstacle.

C. National Environmental Policy Act Implications

The National Environmental Policy Act (NEPA) presents one final obstacle to the Mescalero. The Environmental Impact Statement (EIS) is the heart of NEPA.193 For the Mescalero, the preparation of an EIS is an integral, and possibly final, step in the process to making an MRS facility operational.

The Supreme Court has repeatedly stated that the EIS obligation mandated by NEPA is not a mandate to achieve particular results but only a prescription of the necessary process to be followed to analyze the impact of an action.194 Technically, the Mescalero, themselves, are not responsible for the EIS. An EIS is required whenever "major Federal action significantly affecting the quality of the human environment" is undertaken. Thus, the government agency taking the "major" action is the entity responsible for the production of an EIS to satisfy NEPA. Notably, in the legislation introduced in Congress this year to amend NEPA, the "final agency action" which triggers the EIS requirement is the final decision by the NRC to grant a license application.195

Considering the Supreme Court's consistent interpretation of NEPA in favor of the government, it is unlikely that an EIS will prevent the Mescalero from moving forward with the project. The real obstacle it presents is time-consumption.

191. See 60 Fed. Reg. 32430-31 (June 22, 1995) (to be codified at 10 C.F.R. pt. 72.32). The original final rule for MRS licensing was promulgated on November 30, 1988 but the emergency planning requirements were reserved for decision at a later date. See id.

192. H.R. 1270, 105th Cong., 1st Sess. § 207 (1997). The proposed section states the following:

Upon application by one or more private entities for a license for an independent spent fuel storage installation not located at the site of a civilian nuclear power reactor, the NRC shall review such license application and issue a license for one or more such facilities at the earliest practicable date, to the extent permitted by the applicable provisions of law and regulation. Id.

In addition it provides the following:

Secretary (of Energy) shall encourage efforts to develop private facilities for the storage of spent nuclear fuel by providing any requested information and assistance, as appropriate, to the developers of such facilities and to Indian tribes within whose jurisdictions such facilities may be located, and shall cooperate with the developers of such facilities to facilitate compatibility between such facilities and the Integrated Management System. Id.

193. See NEPA § 102(2)(C) (codified at 42 U.S.C. § 4332(2)(C) (1997)). Section 102(2)(C) requires the following:

[I]n every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, at detailed statement by the responsible official—(i) on the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action. Id.

194. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). The Court elaborated on this point by stating that as long as the "environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." Id. In a series of cases interpreting NEPA called the "Dirty Dozen", some commentators have noted that the Court has gutted the original intent and purpose of NEPA as stated in section 101, consistently deferring to the United States' position. See generally, David C. Shilton, Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record, 20 Env'l. L. 551 (1990).

The process of gathering information, consolidating the data, offering it for public review and comment and responding to comments can take years.\textsuperscript{196} Therefore, even though the NRC does not have to follow the environmentally superior option provided in the EIS, the opening of a facility on the Mescalero reservation could still be delayed by the EIS process.

As a result, it is important for the Mescalero to apply for a license from the NRC as soon as practicable and begin cultivating a relationship with the NRC now. Granted, a consortium of utilities is needed first, as is a specific site and a substantial amount of preliminary scientific study. But the sooner the initial studies and license application are completed, the better the chance that the EIS process can be done simultaneously with the in-depth scientific review and site characterization that will be needed to prepare an MRS site for its ultimate operation. An expedited process that comprehensively analyzes the site and technology for the proposed project can only further the cause of the Mescalero by ensuring the creation of an MRS facility that is as secure as it is technically feasible.

\textbf{VIII. Conclusion}

In the end, it is the Mescalero who must decide for themselves whether the economic benefits outweigh the risks to their land and culture in hosting a private MRS facility. Under the doctrine of inherent Indian sovereignty, first espoused in the "Marshall Trilogy," and pursuant to the provisions of the NWPA, a decision by the Mescalero to forge ahead with such a project should be treated with the respect and validity that a similar decision would receive if it were made by any one of the fifty states. After giving up so much since colonization by the Europeans, this is the least that Native Americans deserve.